



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-054

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

### **Appearances:**

Law Offices of Adam Dayan, PLLC, attorneys for petitioners, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Reach for the Stars Learning Center (RFTS Learning Center) for the 2021-22 and 2022-23 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for the 2021-22 and 2022-23 school years. The appeal must be sustained in part. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but

is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### III. Facts and Procedural History

The student received services through the Early Intervention Program (EIP) beginning at one year of age, received a diagnosis of autism, and presented with global developmental delays (Dist. Ex. 9 at pp. 4, 15). For the 2020-21 school year, the student's EIP services included four 60-minute sessions of applied behavior analysis (ABA) instruction per day (20 hours per week), four 30-minute sessions of speech-language therapy per week, and one 30-minute sessions of occupational therapy (OT) per week delivered in the home (Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1; 6 at p. 1; 9 at p. 4).<sup>1</sup> The student had an individualized family service plan (IFSP) in place for the period of May 5, 2021 until the student's third birthday when he became eligible for special education through the CPSE (Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1; 6 at p. 1).<sup>2</sup>

Following evaluations completed in May and June 2021, a CPSE convened on August 24, 2021, found the student eligible for special education as a preschool student with a disability, and developed an IEP with a projected implementation date of January 1, 2022 (Dist. Exs. 2; see Dist. Ex. 9). On January 7, 2022, a CPSE reconvened and developed an IEP with a projected implementation date of January 18, 2022 (Parent Ex. D). Finding the student remained eligible for special education as a preschool student with a disability, the CPSE recommended that the student attend an 8:1+2 special class in a State-approved special education preschool program and receive three 30-minute sessions of individual speech-language therapy per week and two 30-minute sessions of individual OT per week, all on a 12-month basis (id. at pp. 1-2, 14-15, 17). The CPSE also recommend four 30-minute session of parent counseling and training per year (id. at p. 14).

In a letter dated February 15, 2022, the parents notified the district that they had not received "a recommendation for a school or a list of service providers" from the district to implement the student's January 2022 IEP (Parent Ex. B). Based on the district's failure to arrange for implementation of the IEP, the parents stated their intention to enroll the student at RFTS Learning Center for the 2021-22 school year beginning March 1, 2022 and to seek funding for the costs of the student's tuition from the district (id.). The parents also requested transportation to and from RFTS Learning Center and "reimbursement and/or funding" for private transportation costs should the district fail to provide it (id.).

The parents signed an undated services enrollment agreement with Reach for the Stars Learning and Developing LLC (RFTS-LD) for the 2021-22 school year (Parent Ex. F at pp. 1-2).<sup>3</sup>

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<sup>1</sup> Although the student was authorized to receive four 30-minute session of OT per week, he only received one session per week due to scheduling difficulties (Dist. Exs. 6 at p. 1; 9 at p. 4).

<sup>2</sup> Generally, a student's eligibility for early intervention services ends as of his or her third birthday (see 20 U.S.C. § 1432[5][A]; 34 CFR 303.211[a]); however, State law provides that children in EIPs who are evaluated by the district's CPSE before their third birthday and found to be eligible for preschool educational services under the IDEA, and turn three years of age on or before the last day of August, are eligible to continue receiving early intervention services until the first day of September of the same calendar year if their parents so elect (see Pub. Health Law § 2541[8][a][i]).

<sup>3</sup> According to the hearing record, RFTS-LD worked in conjunction with RFTS Learning Center to provide services to students (see Parent Ex. F at p. 1). For purposes of this decision, when described collectively or when

According to the contract, the parents agreed to collaborate and coordinate with RFTS-LD in developing a services plan for the student (id. at p. 1). The contract indicated that services were "billed on a fee-for-service basis" (id. at p. 2). Appended to the contract was a "Special Education and Related Services Rate Sheet" listing services available through RFTS-LD and the rates charged per half hour (id. at p. 2).

In a prior written notice from the district, dated March 4, 2022, the district responded to the parents' request for "a special class placement" (Dist. Ex. 7 at p. 1). The district summarized the January 2022 CPSE's special education program and related services recommendations (id.). The district indicated that it had identified a tentative preschool location for the student to attend but that, when the parents did not respond to the district's attempts to obtain their consent for services, the offer for placement at the identified preschool was withdrawn on February 9, 2022 (id. at pp. 1-2).

By letter dated May 13, 2022, the parents indicated that they had provided consent forms for the district to provide the student special education but, to date, had "not received a list of providers" and, "[u]pon information and belief, the [district] ha[d] not recommended" a preschool location at which the student could receive the program and services recommended in the January 2022 IEP (Parent Ex. E at p. 1). The parents notified the district that they "officially enrolled" the student at RFTS Learning Center on May 10, 2022 (id.).

In preparation for the 2022-23 school year, on June 9, 2022, the district indicated it could find "a seat" for the student for September as the parents had requested and, on June 16, 2022, followed up with the parents requesting that they sign a provided consent form (Dist. Ex. 8).

By letter to the district, dated June 21, 2022, the parents stated their view that the district had failed to recommend an appropriate program or placement for the student (Parent Ex. H).<sup>4</sup> The parents expressed concern that the student required "a smaller class size" and more frequent related services than recommended on the January 2022 IEP (id. at p. 3). The parents acknowledged that, in June 2022, the district had identified a specific preschool location for the student to attend but stated they had "serious concerns" about the IEP recommendations and preschool site (id.). The parents notified the district that they planned to enroll the student at RFTS Learning Center for the 2022-23 school year and seek district funding for the costs thereof and requested that the district provide transportation (id. at pp. 1, 3). The parents also requested that the district "provide or fund" a neuropsychological evaluation of the student (id. at p. 3).

The parents executed an enrollment agreement with RFTS-LD on September 19, 2022 for delivery of services to the student at RFTS Learning Center during the 2022-23 school year (Parent

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not specified which entity was referenced, RFTS-LD and/or RFTS Learning Center will be referred to simply as RFTS. Neither RFTS-LD nor RFTS Learning Center has been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>4</sup> Parent Exhibit H is marked with pagination that skips page 2 (i.e., the pages in the document are marked H-1, H-3, H-4, H-5), although the document appears complete. For purposes of this decision, the document is cited as marked despite the pagination discrepancy.

Ex. I). In an addendum to the contract, identified as a "Service Plan," maximum frequencies and durations of services were identified for the student for the 2022-23 school year, along with a rate sheet listing rates charged per half hour (id. at pp. 1, 5-6). In particular, the services plan identified that the student would receive up to 25 hours per week of ABA, 10 hours per week of ABA supervision, 3.75 hours per week of OT, 3.75 hours per week of speech-language therapy, and 2.25 hours per week of supervision of related services (id. at p. 6).

### **A. Due Process Complaint Notice**

In a due process complaint notice, dated October 20, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (see Parent Ex. A).

The parents asserted that, during the January 2022 CPSE meeting, they expressed concerns that the student required "a smaller class size due to the severity of his delays and need for consistent 1:1 support" and speech-language therapy and OT at an increased frequency of five times per week to address his "severe language and motor deficits" (Parent Ex. A at p. 4). In addition, the parents alleged that they did not receive notice from the district of a school location for the student to attend leaving them with "no choice but to set up their own placement for the remainder of the 2021-22 school year" (id.).

With respect to the preschool location that the district identified for the student to attend for the 2022-23 school year, the parents alleged that they had previously visited the school in 2021 and had concerns with the poor conditions of the facilities, the size of the school, and the frequency of services (Parent Ex. A at p. 5). Additionally, the parents indicated that they toured the preschool location again on July 26, 2022 but continued to have concerns about the appropriateness of the facility and classroom, as only a 10:1+2 classroom was available, the space "seemed cramped" with small rooms, related services took place in only two half-hour sessions per week, and the school did not use the ABA methodology (id. at pp. 5-6). The parents stated that they toured a second preschool location on August 17, 2022 but also found it inappropriate (id. at p. 6).

The parents alleged that RFTS Learning Center was appropriate to meet the student's needs and that no equitable considerations would warrant a reduction or denial of an award of district funding of the costs of RFTS Learning Center for the 2021-22 and 2022-23 school years (Parent Ex. A at pp. 6-7). For relief, the parents sought tuition reimbursement and/or direct funding for the tuition and related costs and fees for RFTS Learning Center for the 2021-22 and 2022-23 school years (id. at p. 7). The parents also sought district funding for the costs of a neuropsychological IEE (id.). Lastly, the parents requested "appropriate transportation" to and from RFTS or reimbursement/direct funding of transportation expenses incurred for the district's failure to provide the student with transportation (id.).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on November 23, 2022 and concluded on February 15, 2023, after seven days of proceedings (see Tr. pp. 1-323). In a decision dated February 27, 2023, the IHO found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22 and 2022-23 school years, reasoning that, although the district did present

documentary evidence, it failed to produce any witnesses to testify regarding the documents or make a request for more time to secure witnesses (IHO Decision at pp. 6-7, 8). However, with respect to the unilateral placement, the IHO found that the parents did not place the student in an appropriate educational program (*id.* at p. 7). In particular, the IHO stated that the educational director of RFTS Learning Center (educational director), in testimony, "admitted to a deficiency of services due to a shortage of providers" and that the program had "no formal OT curriculum even though the director admitted that OT [wa]s essential for the [s]tudent," concluding that "in many respects the services implemented by RFTS did not reach the levels recommended by the [district]" (*id.*). The IHO also noted that the "overall problem appears to be that RFTS is more an agency that provides a patchwork of fee-based services rather than school with a thoughtfully designed curriculum" as evidenced by "goal sheets with no discernable learning plan or course of study," concluding that the private program selected by the parents was "far from one that was reasonably calculated to enable the child to receive benefits" and "was not designed to meet the unique needs of the [s]tudent" (*id.* at pp. 7-8). Accordingly, the IHO denied all relief requested by the parents (*id.* at p. 8).

#### **IV. Appeal for State-Level Review**

The parents appeal and assert the IHO erred in failing to grant their requested relief. In particular, the parents argue that the IHO erred in finding RFTS Learning Center inappropriate on the grounds that it did not provide OT at a high enough frequency and did not use a formal OT curriculum and because it lacked a "thoughtfully designed curriculum."<sup>5</sup> The parents contend that the IHO failed to consider the totality of the evidence. The parents argue that, having erred in determining that RFTS Learning Center was an inappropriate placement, the IHO failed to reach a conclusion as to whether equitable considerations weighed in favor of the parents' requested relief. The parents argue that they cooperated with the CPSE and provided notice of their intent to unilaterally place the student and that, therefore, equitable considerations support their request for relief. The parents seek an order of district funding for the costs of the student's tuition at RFTS Learning Center. Finally, the parents assert that the IHO erred by not addressing their request for district funding of an IEE.

In an answer and cross-appeal, the district responds to the parents' allegations and argues that the IHO correctly found that that RFTS Learning Center was not an appropriate unilateral placement. The district also argues that equitable considerations do not favor relief for the parents, specifically arguing that the parents withheld consent for special education from the district, the contracts with RFTS-LD did not specify the number of services to be delivered, the parents' notice of unilateral placement was deficient because it informed the district they were unilaterally placing the student at RFTS Learning Center, not RFTS-LD, and the costs of the unilateral placement are excessive. Regarding the IEE, the district asserts that the parents failed to disagree with a specific district evaluation.

As for its cross-appeal, the district asserts that the IHO erred in finding that it failed to offer the student with a FAPE for the 2021-22 and 2022-23 school years. In particular, the district alleges that the IHO erred in finding that the district had to offer witness testimony in order to meet

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<sup>5</sup> Related to the OT services, the parents offer additional evidence with their request for review.

its burden. The district contends that the January 2022 CPSE's recommendation for an 8:1+2 special class was appropriate to address the student's "intensive needs" and that no information before the CPSE indicated the student required 1:1 instruction. As for related services, the district asserts that the CPSE based its recommendations on the student's needs and that nothing in the hearing record supported the parents' position that the student required additional sessions. The district argues that any claim pertaining to the lack of a recommendation for ABA in the IEP was not raised in the parents' due process complaint notice.

In an answer to the district's cross-appeal, the parents respond to the district's allegations and argue that the IHO correctly found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22 and 2022-23 school years.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR

300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>6</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. Of Burlington v. Dep't of Educ., 471 U.S. 359,

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<sup>6</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).



369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## **VI. Discussion**

### **A. FAPE—January 2022 IEP**

In its cross-appeal, the district argues that the IHO erred in finding that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years. The district argues that the IHO erred in finding the lack of district witnesses "determinative" given that IHOs may find that a school district has met its burden to prove a FAPE was offered based on documentary evidence alone.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

Here, the claims raised by the parents, as summarized above, related to the appropriateness of the January 2022 CSE's recommendations for an 8:1+2 special class and related services, as well as allegations about the assigned preschool site (with respect to notice for the 2021-22 school year and appropriateness for the 2022-23 school year) (Parent Ex. A at pp. 4-6).

The district representative offered an opening statement and thereafter rested on the documents offered into evidence; the district did not present any witnesses to support its case-in-chief (see Tr. pp. 43-46, 299; Dist. Exs. 1-10).<sup>7</sup> The district representative engaged in cross-examination of the parents' witnesses and submitted a written closing statement to the IHO (see Tr. pp. 56, 98, 172, 241-42, 256-57; Dist. Post-Hr'g Brief). The district's closing statement to the

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<sup>7</sup> At the December 28, 2022 hearing date, the district representative indicated that the district would not be presenting witnesses because the district could not secure them for that day (Tr. p. 44); however, there is no indication in the hearing record that the district representative requested an adjournment of the hearing for the purpose of producing witnesses.

IHO focused entirely on the appropriateness of the unilateral placement and did not address the district's offer of a FAPE (Dist. Post-Hr'g Brief).

The documentary evidence offered by the district consisted of the evaluations of the student conducted between May and June 2021 (Dist. Ex. 9), the August 2021 IEP (Dist. Ex. 2), progress reports developed by the student's early intervention providers between August and October 2021 (Dist. Exs. 3-6), the January 2022 IEP (Dist. Ex. 1), a March 2022 prior written notice addressing the parents' request for a school assignment and detailing efforts to obtain the parents' consent for the provision of services (Dist. Ex. 7), June 2022 emails from the district to the parents regarding the school location for the 2022-23 school year and requesting the parents' consent for provision of services (Dist. Ex. 8), and a list of district service provider rates (Dist. Ex. 10).

State regulation provides that a CPSE shall recommend "approved appropriate services and/or special programs" for a preschool student with a disability, including "the frequency, duration, location and intensity of such services . . . based on the individual needs of the preschool child," after "first consider[ing] the appropriateness of providing (i) related services only; or (ii) special education itinerant services only; or (iii) related services in combination with special education itinerant services; or (iv) a half-day preschool program . . . ; or (v) a full-day preschool program . . . ." (8 NYCRR 200.16[e][3]).

Here, the sufficiency and accuracy of the student's present levels of performance and individual needs described in the January 2022 IEP are not in dispute. According to the January 2022 IEP, the student performed in the extremely low range with respect to verbal IQ, performance IQ, and full-scale IQ (Parent Ex. D at p. 2). The IEP indicated that the student's cognitive and social/emotional skills were in the severely below average range, and overall, his receptive and expressive language skills were profoundly delayed (*id.*). Delays were noted in the student's sensory integration skills, grasping and visual motor skills, as well as self-help skills (*id.*).

Specifically, with respect to daily living skills, the IEP indicated that the student required assistance to feed himself with a spoon, was not yet toilet trained, and was unable to pull up garments with elastic waistbands, wipe his nose with a tissue, or brush his teeth, and was uncooperative with his face and hands being washed (Parent Ex. D at p. 2). The IEP stated that the student's pragmatic (social) language was reduced and delayed by poor social reciprocity and joint attention, and that receptively, the student evidenced difficulty with grammatical development, auditory directives, and linguistic concepts (*id.*). In addition, with respect to the student's expressive language skills, he demonstrated difficulty with syntax, questions, and vocabulary and concerns with the student's oral motor-sensory-feeding skills included a recent onset of drooling, immature mouthing of inedible objects, and picky eating (*id.*).

With respect to measures of the student's general social/emotional development, he scored in the below-average range and did not play simple group games, or associate objects in play (Parent Ex. D at pp. 2-3). The IEP noted that the student imitated an activity involving housework in play, did not put things away, was unable to work with an adult by doing an activity for five minutes, preferred to play on his own, did not engage in pretend play or share toys, and did not derive satisfaction from doing things with others (*id.*).

According to the January 2022 IEP, the student's gross motor skills were adequate, and he demonstrated deficits in his sensory integration skills, as well as his grasping and visual motor skills (Parent Ex. D at p. 3). The IEP also indicated concerns about the student's fine motor skills (id.).

As supports for the student's management needs, the January 2022 CPSE recommended hand over hand assistance, a great deal of repetition, and positive reinforcement (Parent Ex. D at p. 4). The IEP indicated that the student was "unable to participate 100% of the school day with non[-]disabled peers" (id.). To address the student's needs, the CPSE developed approximately 15 annual goals and corresponding short-term objectives, and each annual goal included measurement criteria, a method of how progress was measured, and a schedule when progress would be measured (id. at pp. 5-13). The January 2022 CPSE recommended a 12-month 8:1+2 special class placement, five hours per day, five days per week, in a State-approved special education program (id. at pp. 14-15). In addition, the CPSE recommended three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and four 30-minute sessions per year of individual parent counseling and training (id. at p. 14).

According to the CPSE meeting summary page appended to the IEP, other programs considered by the CPSE included general education, general education with related services, special education itinerant services (SEIT), and a special class integrated setting (Parent Ex. D at p. 1). The meeting summary indicated that these options were rejected as they were not sufficient to address the student's needs and that a special class with related services would address the student's delays in the least restrictive but most appropriate setting (id.).

In affidavit testimony, the student's mother opined that the January 2022 CPSE's recommendation of 8:1+2 special class placement was insufficient because the student required "a highly structured and specialized program utilizing [ABA] in a small classroom with 1:1 instruction and support," as well as an "individualized curriculum and constant supervision" (Parent Ex. Z ¶¶ 3, 7). In addition, the student's mother testified to her concern that the IEP lacked ABA instruction and a behavior plan, and that the frequencies and durations recommended for OT and speech-language therapy were not enough to address the student's needs (id. ¶ 7). The student's mother also described the lack of notice of a school assignment for the student for the remainder of the 2021-22 school year and her concerns about the assigned preschool location for the 2022-23 school year (id. ¶¶ 4, 9).

Here, while the meeting summary appended to the IEP generically states that the CPSE considered and rejected other options for the student, absent from the hearing record is any articulation of the CPSE's rationale for its recommendation. The hearing record does not include meeting minutes, testimony from any committee member other than the student's mother, or a prior written notice describing, among other things, the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, and a description

of other factors that were relevant to the CSE's proposal or refusal (8 NYCRR 200.5[a][3]; 200.16[h][5]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).<sup>8</sup>

Based on the foregoing, there is no reason to disturb the IHO's finding that the district failed to meet its burden to prove that the January 2022 IEP offered the student a FAPE.

## **B. Unilateral Placement**

The parents argue that the IHO erred in denying funding for the unilateral placement on the grounds that OT was not provided at a high enough frequency and that the program lacked a "thoughtfully designed" curriculum.<sup>9</sup>

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral

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<sup>8</sup> Ideally, if a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

<sup>9</sup> With their request for review, the parents offer, as additional evidence, proposed Parent Exhibit CC, "Occupational Therapy IEP Goals," dated March 2023, and proposed Parent Exhibit DD, containing "Services Affidavit[s]" for December 2022 and January 2023, each dated March 16, 2023 (Req. for Rev., Proposed Parent Exs. CC; DD). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Proposed Parent Ex. CC, dated March 2023 after the impartial hearing which ended in February 2023, was not available at the time of the hearing; however, is not necessary to render a decision in this appeal. The service affidavits in proposed Parent Exhibit DD were sworn on March 16, 2023, also post-dating the hearing; I find the information they contain regarding the services delivered to the student in December 2022 and January 2023 is necessary to the decision in this appeal as more fully explained below. Accordingly, Parent Exhibit CC has been considered.

placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison, 773 F.3d at 386; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. Reach for the Stars Learning Center**

According to its program description, RFTS Learning Center is a full time, independent, not-for-profit school dedicated to the education of children with autism spectrum disorders (Parent Ex. L). The program description states that, to address the unique needs of the students, RFTS has "embraced a patented approach showing great success, The Integrated Model" (id.). In addition, the description notes that "[t]his model uses the best available teaching techniques," including ABA, speech-language therapy, OT, sensory integration training, music therapy, and play therapy (id.). According to the description, "[a]ll therapy is provided to the students on an intensive one to one basis" and the program "also develop[s] a close partnership with parents to help expand the skills" taught at school "to the world of home and community" (id.). The description notes that each student is evaluated in 200 different areas and a program is developed targeting his/her specific needs (id.). Further, the program description states that features of the program include a greater than a 1:1 teacher to student ratio, intensive speech, occupational, and sensory integration therapy with an emphasis on peer socialization, and customized, individual education plans for each student, beginning at age two years nine months and up (id.).

According to the educational director, the screening process for admission into RFTS Learning Center included a review of reports such as IEPs, letters and recommendations from doctors and specialists, a meeting with the student's parents and the student, and an observation of the student in the student's then-current educational setting to evaluate the student's needs in a learning environment and determine whether the student was at a similar functioning and developmental level for their program (Parent Ex. X ¶¶ 1, 15). She testified that assessments were not necessarily completed before developing a student's curriculum, that RFTS Learning Center's "IEP" was called a "curriculum plan," and that "[the] curriculum [wa]s [the] goals" and the goals were "designed by the needs after assessments" (Tr. pp. 181-82, 186-87).<sup>10</sup>

The RFTS educational director stated that the program was a 12-month school year program for children with autism incorporating ABA services throughout the entire school and that related services were made available to all students, including OT, speech-language therapy, and music therapy (Parent Ex. X ¶¶ 10-11). In her affidavit, she noted that the staff worked collaboratively across disciplines to provide tailored and individualized instruction and therapy to meet the needs of the students and that, for the 2022-23 school year, RFTS Learning Center had an enrollment of 28 students, with a total of six classrooms and a 1:1 student-to-teacher ratio in all classrooms (*id.* ¶¶ 12-13). The educational director stated that each classroom had one lead teacher who had previous experience in providing ABA services to students with autism as well as a speech-language pathologist and a behavior analyst assigned to each classroom with up to four assistant teachers (*id.* ¶ 14). She noted that the staff assigned to each classroom allowed for co-treatments and individualized instruction, and all speech pathologists and occupational therapists were required to have their master's degree and be licensed in their respective fields (*id.*). The educational director stated that students were grouped in classes each school year by both age and developmental level, that RFTS Learning Center utilized ABA methodology of instruction in all classrooms, and that the program incorporated many different curriculum types to specifically address the needs of each student including many multi-sensory approaches (*id.* ¶¶ 16-17). In addition, the program used a model to increase students' ability to communicate desires, tolerate being told "no," and transition between more and less desired activities (*id.* ¶ 17).

The educational director stated that RFTS Learning Center used a data-driven program that constantly adapted to the students' progress and level of need and that data was taken on each student and entered into a database where it was analyzed by Board Certified Behavior Analyst (BCBA) supervisors, so changes could be made to a student's program when necessary (Parent Ex. X ¶ 18). She noted that behavioral data was taken during every session with a student including records of the severity and frequency of problematic behavior and that students often had individualized behavior intervention plans and work protocols that provided guidelines to staff on how to respond to various behaviors (*id.*). The educational director stated that RFTS created IEPs for all students and that their IEPs were based on data collected on each student (*id.*).

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<sup>10</sup> The educational director testified that, although RFTS Learning Center referred to the document as a "curriculum plan," she acknowledged that "in years past we might [have] called it [an] 'IEP,'" and that "it kind of goes back and forth in terminology" (Tr. pp. 186-87). As such, the RFTS Learning Center document is referred to as both a curriculum plan and an IEP in the hearing record (*see, e.g.*, Tr. pp. 186-87, 203-04; Parent Ex. X ¶¶ 18, 22).

The educational director noted that, along with student-specific staff trainings and staff trainings in overall theories and methodologies every Friday for 90 minutes, RFTS provided individual or group trainings for parents to learn about how to work with their students, how to incorporate skills learned at school into the home environment, and, if needed, teachers could offer trainings to parents in the home (Parent Ex. X ¶¶ 19-20). Additionally, she testified that staff was "trained in ABA and each teacher [wa]s trained on how to utilize the behavior plan for each student appropriately" (*id.* ¶ 19).

## 2. Specially Designed Instruction

In her affidavit, the parent noted that the student started at RFTS in May 2022 and the educational director indicated that he attended for the 2022-23 school year (Parent Exs. X ¶ 21; Z ¶ 5).<sup>11</sup> According to a "[s]ervices [a]ffidavit" prepared by RFTS-LD, the student began receiving services at RFTS Learning Center on May 27, 2022 (Parent Ex. G at pp. 1, 3).

The educational director testified that as part of the screening process the student was assessed by the RFTS Learning Center team using the Core Skills Assessment, the Autism Curriculum Encyclopedia, the "VB-MAPP," and a speech assessment (Tr. pp. 178-81). The educational director indicated that the student fit the profile of a RFTS student because he demonstrated global developmental delays affecting his expressive and receptive language skills, social skills, sensory integration, motor skills, and cognitive abilities that interfered with the learning process (Parent Ex. X ¶ 21). She stated that the student required 1:1 instruction utilizing ABA and adapted to his individual needs in order to make educational progress and that she was responsible for "overseeing the implementation of his school-based IEP" (*id.* ¶¶ 21-22).<sup>12</sup> Alternatively, the educational director testified that she was not aware of any existing evaluations or documentation which stated that the student required 1:1 instruction or use of ABA methodology to make educational progress (Tr. pp. 204-05).

At RFTS Learning Center, the student was in a classroom with four other students who demonstrated similar academic, social, and behavioral needs, along with four teachers, one assistant, one speech pathologist, and one "BAC" candidate (Parent Ex. X ¶ 23). The educational director noted that, because the student's pre-academic skills were below the expected range for his age group, the student required significant 1:1 attention to learn the basics in functional communication and foundational learning skills and he was able to work in a group to generalize his skills after individualized instruction (*id.*). The educational director stated that each day the

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<sup>11</sup> In a May 13, 2022 letter to the district, the parents' attorney indicated that the student began his program at RFTS Learning Center on May 10, 2022 (Parent Ex. E at p. 1).

<sup>12</sup> During cross examination, the educational director was asked about the references she made to IEPs in her affidavit (Tr. pp. 202-03; Parent Ex. X ¶¶ 9, 15, 18, 22). In his decision, the IHO highlighted the differences between the educational director's testimony regarding IEPs on cross-examination compared to her affidavit (IHO Decision at pp. 3-4; *see* Parent Ex. X ¶ 22). It appears that the educational director's references to the student's "school-based IEP" in her affidavit referred to documents developed by RFTS Learning Center rather than a district IEP, as she testified that she did not review the student's district IEP and did not agree that RFTS Learning Center was responsible for implementing the district's IEP (Tr. pp. 202-04; *see* Parent Ex. X ¶ 18). Rather, she testified that RFTS Learning Center conducted its own assessment of students, reviewed students' needs, and "that's what we would be able to offer" (Tr. p. 203).

student received 1:1 ABA sessions from a list of four providers in addition to his lead teacher who was a "BAC" candidate and was being supervised by two BCBA's (*id.* ¶ 24). She noted that the teachers were primarily working on the student's foundational skills, that compliance (following directions) was a major struggle for the student, and that he became easily frustrated when he did not understand that he had to do something or if he did not want to do it, which led to tantrum behavior such as yelling and hitting (*id.*).

According to the educational director, the student's base schedule for each day of the week was subject to variation based on staff availability and whether the student's behavior required additional BCBA involvement, and if so, the student was observed and the BCBA used both push-in and pull-out methods (Parent Ex. X ¶ 26). The educational director stated that, in addition to receiving classroom instruction utilizing the ABA methodology, the student received speech-language therapy five days per week and OT five days per week with all sessions 45 minutes long to accommodate the student's need for sufficient time to be allotted for transitions from one room to another (*id.* ¶ 27).

The educational director agreed that OT was a necessary service for the student and that, in fact, the student did not receive OT services from May until December 2022 due to a shortage of occupational therapists, and for about eight months, the student did not have a formal OT curriculum plan (Tr. pp. 209-12). With respect to OT services, at the time of the educational director's December 20, 2022 affidavit, the student was receiving 1:1 OT sessions in which he was being assessed, that was taking some time due to his behaviors (Parent Ex. X ¶ 29). She further indicated that OT related skills were incorporated in the student's program such as obstacle courses and gymnastics once per week (*id.*).

During the 2022-23 school year, in speech-language therapy, the educational director noted that the student worked primarily on pre-academic skills, the continuum of communication skills such as requesting and stating things that he wants and needs, on expanding his expressive and receptive language, and on how to match and sort, such as how things are alike or not alike and can still go together (Parent Ex. X ¶ 28).

The educational director testified that the student's ABA and speech-language curriculum plans were created based on the program's assessments and constituted the student's long-term goals and short-term objectives (Tr. pp. 197-99; Parent Exs. O; Q). One "curriculum plan" included seven domains: language and communication, pre-academics, group skills, social and play skills, activities of daily living, health and wellness, community and safety, and behavior skills (Parent Ex. O).<sup>13</sup> Within a domain, the plan included subsections with long-term and short-term objectives (*id.*). For example, in a sub-section for receptive language, the plan provided that the student's long-term objectives were to improve following instructions and to improve discrimination skills, and more specific objectives were listed with condition, level of support, and criterion for success indicated (*id.* at p. 1). Mid-year progress was included under some of these sub-sections and not included under others (*id.* at pp. 1-6). In the "speech and language treatment plan," the four domains included receptive language, expressive language, pragmatics, and articulation with several long-term objectives including to improve overall attention to language

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<sup>13</sup> The document identifies domains numbered 1-2, and 4-8 (see Parent Ex. O).



(improve listener behavior) and to improve requesting skills (manding) (Parent Ex. Q). RFTS Learning Center's July 15, 2022 "Demand Fading Protocol" included "[i]nstructions" for "[a]ntecedent strategies" and "[b]eginning [w]ork" strategies, "[d]emand [f]ading [s]teps" with "[c]riteria to [i]ncrease [s]teps" and directions related to "[c]hanging sessions" or, more specifically, teachers (Parent Ex. R at p. 1). The protocol provided for data collection, but the hearing record does not include any such data (*id.* at pp. 1-2). The student's toilet training protocol included frequency of toileting (interval schedule), encouragement of fluids, duration of toileting, reinforcers when successful, how to proceed when not successful, and things to remember (Parent Ex. S at p. 1).

A core skills summary with assessment dates of August 3, 2022 to August 4, 2022 included a list of goals/skills, mastery criteria, results, summary, and a "performance index" (PI) with a score of "1" indicating little to no independence and a score of "5" indicating mastery of the core skill (Parent Ex. T). A performance index of "1" was noted for the student's following core skills: match identical objects, match identical pictures, match object to picture, match picture to object, session behavior, follow directions, follow directions in a group, indicate body parts, indicate objects, indicate pictures, name objects, name pictures, request assistance, request items, respond to name, respond to stop, conditioned reinforcers, wait for item, wait in group, bladder trained, bowel trained, dress, drink from cup, undress, medical procedures, personal identification, and independent task (*id.* at pp. 1-6). A performance index of "2" was indicated for the student's following core skills: request attention, respond to greeting, demonstrate preferences, follow a point, gross motor imitation, and object imitation (*id.* at pp. 2-4). In addition, the summary indicated that a performance index of "3" was indicated for the student's following core skills: attending, simple discrimination, request termination, delayed object imitation, eat various food, and wash hands (*id.* at pp. 1, 3-4, 6). The summary further noted that a performance index of "4" was indicated for the student's following core skill: accept and reject, and a performance index of "5" was indicated for the following core skills: eat with utensils, exit during fire alarm, exercise, ride in car or van, and walk in community (*id.* at pp. 2, 5-7).

Two other parent exhibits included in the hearing record consist of "Progress Snapshot" ABA data graphs from July to December 2022 and a "VB-MAPP Milestones" scoring form with no interpretation or narrative explanation of their meaning with respect to the student's program or progress at RFTS Learning Center (Parent Exs. U; V). The education director agreed that the ABA data graph showed improvements and declines, and that RFTS Learning Center staff collected data daily and analyzed the data weekly, which allowed staff to respond to the student's needs and implement changes to the student's program (Tr. pp. 205-208; Parent Ex. U).

Accordingly, although the hearing record could have been better supported with the inclusion of more of the data supporting RFTS staff's decisions regarding the student's educational planning, based on the information available in the hearing record, RFTS Learning Center provided the student with specially designed instruction targeted to meet his needs.

### **3. Services Delivered**

As indicated above, the educational director stated that the student's base schedule for each day of the week was subject to variation based on staff availability and whether the student's behavior required additional BCBA involvement (Parent Ex. X ¶ 26). According to the student's

schedule for the 2022-23 school year at RFTS Learning Center, he was scheduled to receive between four and six ABA sessions per day, one speech-language session per day, one OT session per day, and at least one supervised ABA session each day (Parent Ex. M). On further examination, the hearing record reveals that the student received a varying level of services from RFTS each month, and that this variation in the level of services was explained as relating to the fee per service structure rather than a tuition based model (Tr. pp. 100-01, 116; Parent Ex. Y ¶¶ 2-3, 7).

The service plan addendum to the September 2022 enrollment agreement between the parents and RFTS-LD indicated that the student would receive five days and up to 25 hours per week of direct ABA special education services; five days and up to 10 hours per week of ABA supervision; five days and up to 2.25 hours per week of related services supervision; five days and 3.75 hours per week of OT; and five days and 3.75 hours per week of speech-language therapy (Parent Ex. I at pp. 1, 4, 6).

A services affidavit for the 2021-22 school year indicates that, after beginning the program on May 27, 2022, the student received 10.75 hours of direct teacher support services using ABA and 0.75 hours of ABA supervision in total for May 2022 (Parent Exs. G at p. 1; Y ¶¶ 5, 12). The June 2022 services affidavit indicated that the student received 87.50 hours of direct teacher support services using ABA, 13.25 hours of ABA supervision, and 0.75 hours of speech-language therapy services (Parent Ex. G at p. 3).

For July 2022, according to the services affidavit, the student received 67.5 hours of direct teacher support services using ABA, 23.25 hours of ABA supervision, and 11.25 hours of speech-language therapy services (Parent Ex. J at p. 1). The services affidavit for August 2022, stated that the student was provided 56 hours of direct teacher support services using ABA, 31.5 hours of ABA supervision, 6 hours of speech-language therapy, 1 hour of OT, and 5.25 hours of ABA assessment and evaluation (*id.* at p. 2). According to the services affidavit for September 2022, the student received 48.5 hours of direct teacher support services using ABA, 9 hours of ABA supervision, 0.75 hours of related service supervision, 4.5 hours of speech-language therapy, and 3.75 hours of ABA assessment and evaluation (*id.* at p. 3). The services affidavit for October 2022 indicated that the student received 49 hours of direct teacher support services using ABA, 5.5 hours of ABA supervision, 7.5 hours of speech-language therapy, and 1.5 hours of OT (*id.* at p. 4). According to the services affidavit for November 2022, the student received 99.25 hours of direct teacher support services using ABA, 8.25 hours of ABA supervision, 3.5 hours of related service supervision, 14.25 hours of speech-language therapy, and 5 hours of OT (*id.* at p. 5). For December 2022, the services affidavit indicated that the student received 81.5 hours of direct teacher support services using ABA, 10.25 hours of ABA supervision, 1.25 hours of related service supervision, 7.5 hours of speech-language therapy, and 6.75 hours of OT (Parent Ex. DD at p. 1). With respect to January 2023, the services affidavit stated that the student received 90.08 hours of direct teacher support services using ABA, 11.42 hours of ABA supervision, 8.83 hours of speech-language therapy, and 12.08 hours of OT (*id.* at p. 2).

As indicated, the amount of services the student received monthly varied greatly, with the student receiving the least amount of combined ABA services in October 2022, totaling 54.50 hours, compared with November 2022, when the student received the most combined ABA services, a total of 107.50 hours (Parent Exs. J; DD). However, as noted by the RFTS-LD financial

officer and based on a review of the student's attendance record, much of the discrepancy in the amount of ABA services delivered to the student per month may be attributed to the student's attendance (Parent Ex. Y ¶ 7). Additionally, RFTS did not charge for days when the student was absent from school (*id.*). In comparing the student's attendance record, for July 2022 through November 2022, with the total ABA services delivered to the student per month, it appears the student was provided with approximately 5.75 hours of ABA services per day with variations in the amount of daily services per month from approximately 5.375 hours per day in November 2022 to 6.25 hours per day in August 2022 (Parent Exs. J; N). Finally, according to the educational director, the student's schedule for each day of the week was subject to variation based on staff availability and the student's behavior, which caused a fluctuation in the amount of monthly services rendered to the student (Parent Ex. X ¶ 26; *see* Parent Exs. G; J; DD).

Somewhat more troubling than the fluctuation in the amount of ABA services the student received, the hearing record shows that the student's related services also varied from month to month. Taking the student's attendance into account, for July 2022 through November 2022, the student received a little over three hours of speech-language therapy per five days of attendance (Parent Exs. J; N). However, the student received only a total of 7.5 hours of OT services during that same period, with five of those hours occurring in November 2022 (*id.*). As noted above, the RFTS Learning Center educational director agreed that OT was a necessary service for the student and that RFTS did not provide the student with OT services from May until December 2022 due to a shortage of occupational therapists (Tr. pp. 209-12). However, the hearing record shows that the student began receiving OT services in November 2022 and he received OT services for December 2022 and January 2023 (Parent Exs. J; DD). Additionally, the educational director testified that OT related skills were incorporated in the student's program (Tr. pp. 209-12).

Related to the delivery of services during the 2022-23 school year, is the student's progress at the unilateral placement. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; *see* M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; *see also* Frank G., 459 F.3d at 364).<sup>14</sup> However, a finding of progress

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<sup>14</sup> Conversely, the Second Circuit has also noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; *see* Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

With respect to progress, mid-year progress notes included in the RFTS curriculum plan indicated that the student made progress in his ability to "discriminate between language," in his ability to follow single step instructions, and that the student showed growth in "using single word mands" when an object and action were present (Parent Ex. O at pp. 1-2). The August 2022 core skills summary provided a performance index; however, there is no evidence in the hearing record with which to compare the student's noted performance in order to determine whether the student made progress (see Parent Ex. T at pp. 1-7). The hearing record included testimony from the educational director that RFTS Learning Center was a data-driven program that constantly adapted to the students' progress and level of need, and that data was taken on each student and entered into a database where it was analyzed by BCBA supervisors, so that changes could be made to the student's program when necessary (Parent Ex. X ¶ 18). Additionally, the educational director noted that the student improved "his ability to sit in a chair functionally and for longer periods of time and wait[]" (id. ¶ 24). The parent noted that the student made significant improvement in his communication skills as indicated by increased talking, sometimes connecting two or three words at a time, and that the student made more requests for things, improved in his playing skills, and she believed he was making progress because of his placement at RFTS Learning Center (Parent Ex. Z ¶ 20).

One can imagine circumstances where the variation in the level of services delivered to the student in a private program made up entirely of fee-for-services plans could be problematic where the totality of the program is not otherwise defined. In fact, as discussed above, the variation in the level of services delivered to the student highlights circumstances unique to a private program made up entirely of fee-for-services plans. While a tuition-based program generally encompasses a full day school program, a fee-for-service plan such as that used by RFTS-LD is more fluid and, in this instance, there is little explanation in the hearing record as to what the student's program entailed on days where the level of services delivered did not fill the entirety of the student's school day. For example, as the district points out, the hearing record is silent regarding how the student's day was structured when the student did not receive OT services as planned (compare Parent Ex. M, with Parent Exs. G; J).

Nevertheless, as a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as RFTS Learning Center—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (Carter, 510 U.S. at 13-14). Here, RFTS Learning Center developed a learning plan for the student as described in the testimony of the educational director, the student's schedule, the curriculum plans, and the demand fading protocol and toileting protocol, as well as in the services plan appended to the enrollment contract for the 2022-23 school year (Parent Exs. I at p. 6; M; O; Q; R; S). Furthermore, to the extent RFTS Learning Center did not deliver all of the services as planned due to a shortage of providers and, in particular, the OT services, a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP. Further, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489

F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at \*9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]).

Based on the above, although I am somewhat skeptical of the variation in the level of services delivered to the student due to the fee-for-services plan utilized by RFTS and the general lack of information about the program the student was in when he was not receiving services a-la-carte, the hearing record, as a whole, supports finding that the services the student received were specially designed to address his special education needs.

Finally, although the hearing record supports finding that the services that were delivered to the student were appropriate, given the structure of the unilateral placement, this evidence does not support a finding that the unilateral placement would have provided an appropriate educational program to the student for the remainder of the 2022-23 school year. The impartial hearing took place in the middle of the 2022-23 school year; therefore, affidavits of services delivered demonstrating the amounts of each service that the student received each month are only included in the hearing record for May 2022 through January 2023 (Parent Exs. G; J; DD). Given the fluidity of the services delivered and relative unpredictability of service levels from month to month, it is not possible to find that services beyond these dates are appropriate. Unlike a contract for tuition that implies a minimum amount of educational programming for the entirety of a school year, the fee-for-service structure of RTFS makes no such guarantee. While the services plan for the student appended to the enrollment contract for the 2022-23 school year sets forth maximum frequencies for each recommended service (Parent Ex. I at p. 6), there was no guaranteed minimum of services that the student would receive. Thus, the parents have not met their burden to prove that services delivered to the student after January 2023 were sufficient to meet the student's special education needs and could therefore be deemed appropriate.

### **C. Equitable Considerations**

The parents argue that, having erred in determining that RFTS Learning Center was an inappropriate placement, the IHO did not reach a conclusion on whether the equitable considerations weighed in favor of granting the parents' requested relief.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to

equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA").

### **1. Consent for Initial Provision of Services**

Initially, the district argues that the parents withheld their consent for services and that, therefore, the district was prevented from offering an appropriate school placement. According to the IDEA and federal and State regulations, a district "must obtain informed consent" from the parent of a student with a disability "before the initial provision of special education and related services" to the student (20 U.S.C. § 1414[a][1][D][i][II]; 34 CFR 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]; 200.16[h][7]). In addition, the district must make "reasonable efforts to obtain informed consent" from the parent, which requires that the district keep a record of attempts to secure such consent through "detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits" (34 CFR 300.300[b][2], [d][5]; 300.322[d]; see 8 NYCRR 200.5[b][1]; Parental Consent for Services, 71 Fed. Reg. 46633-34 [Aug. 14, 2006]). When a parent fails to respond to a request for consent or refuses to consent to the provision of special education and related services, the district will not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure of the district to provide the student with the special education and related services for which district sought consent (20 U.S.C. § 1414 [a][1][D][ii][III][aa]; 34 CFR 300.300[b][3][ii]; 8 NYCRR 200.5[b][4][i]).

In its March 4, 2022 prior written notice, the district responded to a "placement request" from the parent indicating that the offer of a school location had been withdrawn because the parent did not provide consent for services and that the parents' consent was necessary in order to secure a school location for the student (Dist. Ex. 7 at pp. 1-2). The district indicated that a tentative school location had been identified pending parental consent and that, on January 23, 2022, a withdrawal notification was issued informing the parent that consent needed to be obtained by February 1, 2022 or the offer of school location would be withdrawn (id.). The prior written notice indicated that outreach by the district to obtain consent from the parent was made on January 7, 2022, January 14, 2022, January 23, 2022, February 1, 2022, and February 9, 2022, and that, because consent was not provided by the parent, the district withdrew its school location offer on February 9, 2022 (id. at p. 1). The prior written notice stated that the parents' "lack of response prevented CPSE from further action," that "[w]hen/[i]f parent provides consent to services, a placement in the appropriate setting will be obtained and offered to the parent for the student," and that, as of February 9, 2022, the case was closed and could be re-opened upon receipt of parental consent (id. at p. 2).

Despite the foregoing, in a letter dated May 13, 2022, in which the parents notified the district of their intent to unilaterally place the student, the parents indicated that they had provided consent for provision of special education services (Parent Ex. E at p. 1).

In an email dated June 9, 2022, the district identified a preschool location for the student to attend beginning in September 2022; the email referenced an attached consent form and requested that the parent sign the form "to accept services" (Dist. Ex. 8 at pp. 1-2). On June 16, 2022, the district followed up with the parents and again requested they sign the consent form (*id.* at p. 1). In its answer, the district "[p]resum[es]" that the parents ultimately provided the district consent given that the district went on to offer school locations for the student to attend (Answer & Cr. Appeal ¶ 4). The student's mother testified that the parents visited and rejected the two school locations offered by the district (Parent Ex. Z ¶¶ 9-10).

While the prior written notice purports to list the district's attempts to obtain the parents' consent, the hearing record does not include a copy of any correspondence sent from the district to the parents requesting consent or the withdrawal notification referenced in the prior written notice, a copy of the consent form, or a call log or other events log updated contemporaneously with the district's purported attempts to reach the parents. Nor does the hearing record include any testimony from a district witness regarding the district's efforts. In light of the foregoing, the district's evidence on the issue of consent is not sufficient to warrant a reduction or denial of tuition funding.

## 2. Notice of Unilateral Placement

Next, the district argues that equitable considerations weigh against full reimbursement because the parents' notice to the district of their intent to unilaterally place the student was insufficient. Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; *see* 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (*Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (*Greenland*, 358 F.3d at 160; *Ms. M. v. Portland Sch. Comm.*, 360 F.3d 267 [1st Cir. 2004]; *Berger*, 348 F.3d at 523-24; *Rafferty*, 315 F.3d at 27); *see* *Frank G.*, 459 F.3d at 376; *Voluntown*, 226 F.3d at 68).

Here, the parents' notices to the district were timely, adequately notified the district that they were rejecting the district's recommended program and the reasons for the rejection, and stated their intent to unilaterally place the student at district expense (Parent Exs. B; E; H). The district does not argue otherwise. Instead, the district focuses on the reference in the parents' notices to RFTS Learning Center (Parent Exs. B; H), as opposed to RFTS-LD, the entity with which the parents contracted for the delivery of special education (Parent Exs. F; I). However, the distinction appears to be without a difference, at least for purposes of the parents' notice to the district. The district does not allege that the reference to the RFTS Learning Center in the parents' notices had any impact on the district's ability to offer the student a FAPE before the parents removed the

student. Accordingly, the district's argument that any award should be reduced on this ground is without merit.

### **3. Parents' Financial Obligation**

The district further argues that the parents failed to demonstrate a financial obligation to the unilateral placement, arguing that the contract with RFTS-LD for the 2021-22 school year lacked terms specifying the number of hours of services to be delivered to the student and that the parents did not pay the registration fee required as a condition of the contract for the 2022-23 school year.

The undated enrollment agreement between the parents and RFTS-LD for the 2021-22 school year indicated that the parents would collaborate and coordinate with RFTS-LD in developing a services plan for the student and that services were billed on a fee-for-service basis and included a list of rates charged for each type of service per half hour (Parent Ex. F at pp. 1-2). While the contract is not specific with respect to the exact services the student would receive, there is insufficient basis to controvert the executed enrollment contract, which obligated the parents to pay RFTS-LD for the costs of services delivered to the student and identified essential terms of the agreement, such as the types and costs of services that could be provided to the student (see E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]). The hearing record also includes service affidavits outlining what services were delivered to the student and the amount due for those services under the contract in May through January 2023 and evidence that at least one payment was made on behalf of the parents to RFTS-LD in May 2022, further demonstrating the parents' financial obligation (Parent Exs. G; J; DD).

As for the parents' purported failure to pay a registration fee referenced in the contract with RFTS-LD for the 2022-23 school year, this nonpayment would not make the contract unenforceable or effect a finding that the parents did not have a financial obligation to RFTS-LD for the costs of the registration fee and for the services delivered pursuant to the contract (Parent Ex. I). Accordingly, the district's argument on this point is without merit.

### **4. Excessiveness of Services**

As a final point relating to equitable considerations, the district argues that the costs of the services charged by RFTS-LD were excessive. Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at \*7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

To support its position that the costs of RTFS were excessive, the district entered into evidence its own list of "maximum rates allowed by the [district] for independent non-[district]



providers" to compare to the costs of the services delivered to the student at RFTS Learning Center (Dist. Ex. 10). However, the district's list of rates is undated (*id.*), and the district offered no witness to testify as to the circumstances when such rates might be applicable or why a comparison to RFTS-LD's rates would be appropriate. Moreover, the district's list does not include rates for ABA, ABA supervision, or related services supervision to compare to the costs of such services as charged by RFTS-LD (compare Dist. Ex. 10, with Parent Exs. F at p. 2; I at p. 5). Accordingly, I find that the hearing record is insufficiently developed with regard to costs of comparable services available elsewhere to make a determination that the costs of services charged by RFTS-LD were excessive.

The district also argues that the hearing record lacked evidence that the student required ABA and that, therefore, ABA services provided by RFTS were excessive. ABA is a methodology RFTS uses for the student's instruction and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257).

While it is possible that the student could have received educational benefit in a program without ABA—and that the district would not necessarily have been required to provide ABA in order to offer the student a FAPE—RFTS's decision to address the student's needs using ABA methodology amounts to a difference in approach among professionals and does not, without more, support a finding that delivery of the service was so impermissibly excessive as to warrant denial. Indeed, were the ABA services delivered to the student at RFTS to be segregated from the program, the student would be left with a program of related services only, which would not be sufficient to amount to a FAPE.

Finally, the district disputes RFTS-LD's charges for "ABA – Assessment and Evaluation" services, arguing that such services were not contemplated in the contracts or services plan. However, the contracts with RFTS-LD both list ABA assessment and evaluation in the included rate sheets (Parent Exs. F at p. 2; I at p. 5). It is appropriate to include funding for assessment of the student in the costs of the unilateral placement, and there is no basis provided by the district for finding that assessment and evaluation of the student (perhaps as opposed to a plan for service delivery) had to be specifically included in a services plan in order to be eligible for funding.

Although the district's arguments do not support finding that the cost of the services provided by RFTS-LD were excessive, it is worth noting that, while the evidence in the hearing record does not support finding that the fees charged by RFTS-LD were excessive, likewise, there is also insufficient evidence in the hearing record to determine that the costs being charged by RFTS-LD were reasonable. In this instance, although I have considered remanding this matter for further development of the hearing record on this issue (see 8 NYCRR 279.10[c] [providing that a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]), neither party has requested a remand or attempted to introduce additional evidence to show an appropriate rate for the services rendered. Accordingly, based on the limited hearing record before me, I will order that the district fund the student's services as provided by RFTS-LD.

## D. Independent Educational Evaluation

The parents contend that the IHO erred in failing to issue a decision on the parents' request for the student to be independently evaluated. The parents argue that the evaluations conducted in connection with the student's transition from the EIP to the CPSE failed to offer a diagnosis or recommendations for services. In addition, the parents allege that the district did not offer any argument at the impartial hearing that it should not be required to fund an IEE.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]; 200.16[d][3]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).<sup>15</sup>

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In their June 21, 2022 notice of intent to unilaterally place the student at RFTS, the parents requested that the district "provide or fund a comprehensive neuropsychological evaluation to assess all areas of [the student's] cognitive, linguistic, social, and behavioral functioning, or reimburse the [p]arents for costs they incur in securing a private evaluation" (Parent Ex. H at p. 3); such request was reiterated in the due process complaint notice (Parent Ex. A at p. 5). However,

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<sup>15</sup> Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that, if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

in making their request for the district to provide or fund a neuropsychological evaluation, the parents at no point stated disagreement with a district evaluation (see generally Parent Exs. A at p. 5; H at p. 3).

Thus, the evidence in the hearing record convinces me that the parents did not make their request in a way that the district should have expected the parents were disagreeing with an evaluation conducted by the district or that they were seeking an IEE at district expense (see Application of a Student with a Disability, Appeal No. 19-018 [where the parent did not seek an evaluation by an independent evaluator, appropriate relief was to order the district to conduct the evaluation rather than award an IEE]).

Even if the parents appropriately requested an IEE at district expense, the evidence in the hearing record does not support a finding that the evaluations relied on by the CPSE were inappropriate. The hearing record includes a multidisciplinary evaluation conducted in May and June 2021 by a State-approved agency (Dist. Ex. 9; see NYCRR 200.1[ppp]; 200.7[a]). On appeal, the parents argue that the evaluations were inappropriate because they failed to contain specific program recommendations or diagnoses. However, while a school district is required to ensure that students are evaluated in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), it is not necessarily required that the district, through its evaluation, "identify the underlying causes" of the student's needs (MB v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at \*12 [S.D.N.Y. Mar. 29, 2018]). Moreover, a CPSE is tasked with making recommendations for a student based on evaluations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]); the evaluations need not make specific recommendations in order to be deemed sufficient. Indeed, with respect to initial evaluation of preschool students to determine whether the student is eligible for special education, State regulation specifically provides that "The summary report shall not include a recommendation as to the general type, frequency, location and duration of special education services and programs that should be provided; shall not address the manner in which the preschool student can be provided with instruction or related services in the least restrictive environment; and shall not make reference to any specific provider of special services or programs" (8 NYCRR 200.16[c][2]).

Here, although there is no question that the parents were seeking to obtain information about the student in order to plan for the student's educational programming, the parents failed to follow the process outlined in the IDEA and its implementing regulations for seeking an IEE in that they did not state a disagreement with a district evaluation and, in any event, on appeal, the parents do not articulate a valid challenge to the appropriateness of the district's evaluation. Accordingly, the hearing record does not support the parents' request for a neuropsychological IEE.

## **VII. Conclusion**

The evidence in the hearing record does not support diverging from the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22 and 2022-23 school years. However, contrary to the IHO's finding, the evidence in the hearing record demonstrates that the services actually delivered to the student at RTFS Learning Center between May 2022 and January 2023 constituted an appropriate unilateral placement. Nevertheless, as the contract for services did not provide for a tuition-based program

with a guaranteed minimum amount of services or a set educational program, the evidence in the hearing record is insufficient to support a finding that the unilateral placement was appropriate for the remainder of the 2022-23 school year after January 2023. As detailed above, equitable considerations do not warrant reduction or denial of the parents' request for district funding of the costs of the student's attendance at RFTS Learning Center, with services provided by RFTS-LD, for the period of May 2022 through January 2023. Finally, the hearing record does not support the parents' request for a neuropsychological IEE.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determination above.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated February 17, 2023, is modified by reversing that portion of the decision which found the parent's unilateral placement was not appropriate for the period of May 2022 through January 2023,

**IT IS FURTHER ORDERED** that the district shall directly pay or reimburse the parents for the costs of the services the student received at RFTS during the 2022-23 school year through January 2023.

**Dated:**            **Albany, New York**  
                         **June 5, 2023**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**